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UNITED STATES DISTRICT COURT

FOR NORTHERN DISTRICT OF CALIFORNIA

FRESNO ROCK TACO, LLC., a California ) CASE NO. 11-CV-00634 JSW  
limited liability company; MILTON PETER )  
BARBIS, an individual, )

Plaintiff, ) HONORABLE JEFFREY S. WHITE  
) UNITED STATES DISTRICT JUDGE

v. )

RED HEAD, INC, dba Cabo Wabo Enterprises )  
a California corporation; ) STIPULATED PROTECTIVE ORDER  
)

Defendant. )

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. The parties further acknowledge, as set forth in Section 12.3, below, that this Stipulated Protective Order does not entitle them to file confidential information under seal; Civil Local Rule 79-5 and General Order 62 set forth the procedures that must be

1 followed and the standards that will be applied when a party seeks permission  
2 from the court to file material under seal.

3  
4 2. DEFINITIONS

5 1 Challenging Party: a Party or Non-Party that challenges the  
6 designation of information or items under this Order.

7 2 "CONFIDENTIAL" Information or Items: information (regardless of  
8 how it is generated, stored or maintained) or tangible things that qualify for  
9 protection under Federal Rule of Civil Procedure 26(c).

10 3 Counsel (without qualifier): Outside Counsel of Record and House  
11 Counsel (as well as their support staff).

12 4 Designating Party: a Party or Non-Party that designates  
13 information or items that it produces in disclosures or in responses to  
14 discovery as "CONFIDENTIAL."

15 5 Disclosure or Discovery Material: all items or information, regardless  
16 of the medium or manner in which it is generated, stored, or maintained  
17 (including, among other things, testimony, transcripts, and tangible things), that  
18 are produced or generated in disclosures or responses to discovery in this matter.

19 6 Expert: a person with specialized knowledge or experience in a matter  
20 pertinent to the litigation who has been retained by a Party or its counsel to serve  
21 as an expert witness or as a consultant in this action.

22 7 House Counsel: attorneys who are employees of a party to this action.  
23 House Counsel does not include Outside Counsel of Record or any other outside  
24 counsel.

25 8 Non-Party: any natural person, partnership, corporation, association,  
26 or other legal entity not named as a Party to this action.

27 9 Outside Counsel of Record: attorneys who are not employees of a  
28 party to this action but are retained to represent or advise a party to this action and

1 have appeared in this action on behalf of that party or are affiliated with a law firm  
2 which has appeared on behalf of that party.

3 10 Party: any party to this action, including all of its officers,  
4 directors, employees, consultants, retained experts, and Outside Counsel  
5 of Record (and their support staffs).

6 11 Producing Party: a Party or Non-Party that produces Disclosure or  
7 Discovery Material in this action.

8 12 Professional Vendors: persons or entities that provide litigation  
9 support services (e.g., photocopying, videotaping, translating, preparing exhibits  
10 or demonstrations, and organizing, storing, or retrieving data in any form or  
11 medium) and their employees and subcontractors.

12 13 Protected Material: any Disclosure c.; Discovery Material  
13 that is designated as "CONFIDENTIAL."

14 14 Receiving Party: a Party that receives Disclosure or Discovery  
15 Material from a Producing Party.

16 3. SCOPE

17 The protections conferred by this Stipulation and Order cover not only  
18 Protected Material (as defined above), but also (1) any information copied or  
19 extracted from Protected Material; (2) all copies, excerpts, summaries, or  
20 compilations of Protected Material; and (3) any testimony, conversations, or  
21 presentations by Parties or their Counsel that might reveal Protected Material.  
22 However, the protections conferred by this Stipulation and Order do not cover the  
23 following information: (a) any information that is in the public domain at the time  
24 of disclosure to a Receiving Party or becomes part of the public domain after its  
25 disclosure to a Receiving Party as a result of publication not involving a violation  
26 of this Order, including becoming part of the public record through trial or  
27 otherwise; and (b) any information known to the Receiving Party prior to the  
28 disclosure or obtained by the Receiving Party after the disclosure from a source

1 who obtained the information lawfully and under no obligation of confidentiality  
2 to the Designating Party. Any use of Protected Material at trial shall be governed  
3 by a separate agreement or order.

4 4. DURATION

5 Even after final disposition of this litigation, the confidentiality obligations  
6 imposed by this Order shall remain in effect until a Designating Party agrees  
7 otherwise in writing or a court order otherwise directs. Final disposition shall be  
8 deemed to be the later of (1) dismissal of all claims and defenses in this action,  
9 with or without prejudice; and (2) final judgment herein after the completion and  
10 exhaustion of all appeals, rehearings, remands, trials, or reviews of this action,  
11 including the time limits for filing any motions or applications for extension of  
12 time pursuant to applicable law.

13  
14 5. DESIGNATING PROTECTED MATERIAL

15 1 Exercise of Restraint and Care in Designating Material for Protection.

16 Each Party or NonParty that designates information or items for protection under  
17 this Order must take care to limit any such designation to specific material that  
18 qualifies under the appropriate standards. The Designating Party must designate  
19 for protection only those parts of material, documents, items, or oral or written  
20 communications that qualify – so that other portions of the material, documents,  
21 items, or communications for which protection is not warranted are not swept  
22 unjustifiably within the ambit of this Order.

23 Mass, indiscriminate, or routinized designations are prohibited.  
24 Designations that are shown to be clearly unjustified or that have been made for  
25 an improper purpose (e.g., to unnecessarily encumber or retard the case  
26 development process or to impose unnecessary expenses and burdens on other  
27 parties) expose the Designating Party to sanctions.  
28

1 If it comes to a Designating Party's attention that information or items that  
2 it designated for protection do not qualify for protection, that Designating Party  
3 must promptly notify all other Parties that it is withdrawing the mistaken  
4 designation.

5 2 Manner and Timing of Designations. Except as otherwise provided  
6 in this Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise  
7 stipulated or ordered, Disclosure or Discovery Material that qualifies for  
8 protection under this Order must be clearly so designated before the material is  
9 disclosed or produced.

10 Designation in conformity with this Order requires:

11 (a) for information in documentary form (e.g., paper or electronic  
12 documents, but excluding transcripts of depositions or other pretrial or trial  
13 proceedings), that the Producing Party affix the legend "CONFIDENTIAL" to  
14 each page that contains protected material. If only a portion or portions of the  
15 material on a page qualifies for protection, the Producing Party also must clearly  
16 identify the protected portion(s) (e.g., by making appropriate markings in the  
17 margins).

18 A Party or Non-Party that makes original documents or materials available  
19 for inspection need not designate them for protection until after the inspecting  
20 Party has indicated which material it would like copied and produced. During the  
21 inspection and before the designation, all of the material made available for  
22 inspection shall be deemed "CONFIDENTIAL." After the inspecting Party has  
23 identified the documents it wants copied and produced, the Producing Party must  
24 determine which documents, or portions thereof, qualify for protection under this  
25 Order. Then, before producing the specified documents, the Producing Party must  
26 affix the "CONFIDENTIAL" legend to each page that contains Protected Material.  
27 If only a portion or portions of the material on a page qualifies for protection, the  
28



1 Producing Party also must clearly identify the protected portion(s) (e.g., by making  
2 appropriate markings in the margins).

3 (b) for testimony given in deposition or in other pretrial or trial  
4 proceedings, that the Designating Party identify on the record, before the close of  
5 the deposition, hearing, or other proceeding, all protected testimony.

6 (c) for information produced in some form other than documentary  
7 and for any other tangible items, that the Producing Party affix in a prominent  
8 place on the exterior of the container or containers in which the information or  
9 item is stored the legend "CONFIDENTIAL." If only a portion or portions of the  
10 information or item warrant protection, the Producing Party, to the extent  
11 practicable, shall identify the protected portion(s).

12 3 Inadvertent Failures to Designate. If timely corrected, an inadvertent  
13 failure to designate qualified information or items does not, standing alone, waive  
14 the Designating Party's right to secure protection under this Order for such  
15 material. Upon timely correction of a designation, the Receiving Party must make  
16 reasonable efforts to assure that the material is treated in accordance with the  
17 provisions of this Order.

## 18 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

19 1 Timing of Challenges. Any Party or Non-Party may challenge a  
20 designation of confidentiality at any time. Unless a prompt challenge to a  
21 Designating Party's confidentiality designation is necessary to avoid foreseeable,  
22 substantial unfairness, unnecessary economic burdens, or a significant disruption  
23 or delay of the litigation, a Party does not waive its right to challenge a  
24 confidentiality designation by electing not to mount a challenge promptly after the  
25 original designation is disclosed.

26 2 Meet and Confer. The Challenging Party shall initiate the dispute  
27 resolution process by providing written notice of each designation it is challenging  
28 and describing the basis for each challenge. To avoid ambiguity as to whether a

1 challenge has been made, the written notice must recite that the challenge to  
2 confidentiality is being made in accordance with this specific paragraph of the  
3 Protective Order. The parties shall attempt to resolve each challenge in good faith  
4 and must begin the process by conferring directly (in voice to voice dialogue;  
5 other forms of communication are not sufficient) within 14 days of the date of  
6 service of notice. In conferring, the Challenging Party must explain the basis for  
7 its belief that the confidentiality designation was not proper and must give the  
8 Designating Party an opportunity to review the designated material, to reconsider  
9 the circumstances, and, if no change in designation is offered, to explain the basis  
10 for the chosen designation. A Challenging Party may proceed to the next stage of  
11 the challenge process only if it has engaged in this meet and confer process first  
12 or establishes that the Designating Party is unwilling to participate in the meet and  
13 confer process in a timely manner.

14       3     Judicial Intervention. If the Parties cannot resolve a challenge without  
15 court intervention, the Designating Party shall file and serve a motion to retain  
16 confidentiality under Civil Local Rule 7 (and in compliance with Civil Local Rule  
17 79-5 and General Order 62, if applicable) within 21 days of the initial notice of  
18 challenge or within 14 days of the parties agreeing that the meet and confer  
19 process will not resolve their dispute, whichever is earlier. Each such motion must  
20 be accompanied by a competent declaration affirming that the movant has  
21 complied with the meet and confer requirements imposed in the preceding  
22 paragraph. Failure by the Designating Party to make such a motion including the  
23 required declaration within 21 days (or 14 days, if applicable) shall automatically  
24 waive the confidentiality designation for each challenged designation. In addition,  
25 the Challenging Party may file a motion challenging a confidentiality designation  
26 at any time if there is good cause for doing so, including a challenge to the  
27 designation of a deposition transcript or any portions thereof. Any motion brought  
28 pursuant to this provision must be accompanied by a competent declaration

1 affirming that the movant has complied with the meet and confer requirements  
2 imposed by the preceding paragraph.

3 The burden of persuasion in any such challenge proceeding shall be on the  
4 Designating Party. Frivolous challenges, and those made for an improper purpose  
5 (e.g., to harass or impose unnecessary expenses and burdens on other parties) may  
6 expose the Challenging Party to sanctions. Unless the Designating Party has  
7 waived the confidentiality designation by failing to file a motion to retain  
8 confidentiality as described above, all parties shall continue to afford the material  
9 in question the level of

10 protection to which it is entitled under the Producing Party's  
11 designation until the court rules on the challenge.

12 7. ACCESS TO AND USE OF PROTECTED MATERIAL

13 1 Basic Principles. A Receiving Party may use Protected Material that  
14 is disclosed or produced by another Party or by a Non-Party in connection with  
15 this case only for prosecuting, defending, or attempting to settle this litigation.  
16 Such Protected Material may be disclosed only to the categories of persons and  
17 under the conditions described in this Order. When the litigation has been  
18 terminated, a Receiving Party must comply with the provisions of section 13  
19 below (FINAL DISPOSITION).

20 Protected Material must be stored and maintained by a Receiving Party at  
21 a location and in a secure manner that ensures that access is limited to the persons  
22 authorized under this Order.

23 2 Disclosure of "CONFIDENTIAL" Information or Items. Unless  
24 otherwise ordered by the court or permitted in writing by the Designating Party,  
25 a Receiving Party may disclose any information or item designated  
26 "CONFIDENTIAL" only to:  
27  
28



1 (a) the Receiving Party's Outside Counsel of Record in this action,  
2 as well as employees of said Outside Counsel of Record to whom it is reasonably  
3 necessary to disclose the information for this litigation and who have signed the  
4 "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit  
5 A;

6 (b) the officers, directors, and employees (including House Counsel)  
7 of the Receiving Party to whom disclosure is reasonably necessary for this  
8 litigation and who have signed the "Acknowledgment and Agreement to Be  
9 Bound" (Exhibit A);

10 (c) Experts (as defined in this Order) of the Receiving Party to whom  
11 disclosure is reasonably necessary for this litigation and who have signed the  
12 "Acknowledgment and Agreement to Be Bound" (Exhibit A);

13 (d) the court and its personnel;

14 (e) court reporters and their staff, professional jury or trial  
15 consultants, mock jurors, and Professional Vendors to whom disclosure is  
16 reasonably necessary for this litigation and who have signed the  
17 "Acknowledgment and Agreement to Be Bound" (Exhibit A);

18 (f) during their depositions, witnesses in the action to whom  
19 disclosure is reasonably necessary and who have signed the "Acknowledgment  
20 and Agreement to Be Bound" (Exhibit A), unless otherwise agreed by the  
21 Designating Party or ordered by the court. Pages of transcribed deposition  
22 testimony or exhibits to depositions that reveal Protected Material must be  
23 separately bound by the court reporter and may not be disclosed to anyone except  
24 as permitted under this Stipulated Protective Order.

25 (g) the author or recipient of a document containing the information  
26 or a custodian or other person who otherwise possessed or knew the information.  
27  
28

1       8 PROTECTED MATERIAL SUBPOENAED OR ORDERED  
2       9 PRODUCED IN OTHER LITIGATION

3               If a Party is served with a subpoena or a court order issued in other litigation  
4       that compels disclosure of any information or items designated in this action as  
5       “CONFIDENTIAL,” that Party must:

6               (a) promptly notify in writing the Designating Party. Such notification  
7       shall include a copy of the subpoena or court order;

8               (b) promptly notify in writing the party who caused the subpoena or  
9       order to issue in the other litigation that some or all of the material covered by the  
10      subpoena or order is subject to this Protective Order. Such notification shall  
11      include a copy of this Stipulated Protective Order; and

12              (c) cooperate with respect to all reasonable procedures sought  
13      to be pursued by the Designating Party whose Protected Material may be  
14      affected.

15              If the Designating Party timely seeks a protective order, the Party served  
16      with the subpoena or court order shall not produce any information designated in  
17      this action as “CONFIDENTIAL” before a determination by the court from which  
18      the subpoena or order issued, unless the Party has obtained the Designating Party’s  
19      permission. The Designating Party shall bear the burden and expense of seeking  
20      protection in that court of its confidential material – and nothing in these provisions  
21      should be construed as authorizing or encouraging a Receiving Party in this action  
22      to disobey a lawful directive from another court.

23       9. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE  
24       PRODUCED IN THIS LITIGATION

25              (a)     The terms of this Order are applicable to information produced  
26      by a Non-Party in this action and designated as “CONFIDENTIAL.” Such  
27      information produced by Non-Parties in connection with this litigation is protected  
28      by the remedies and relief provided by this Order. Nothing in these provisions

1 should be construed as prohibiting a Non-Party from seeking additional  
2 protections.

3 (b) In the event that a Party is required, by a valid discovery  
4 request, to produce a Non-Party's confidential information in its possession, and  
5 the Party is subject to an agreement with the Non-Party not to produce the  
6 Non-Party's confidential information, then the Party shall:

7 (1) promptly notify in writing the Requesting Party and the  
8 Non-Party that some or all of the information requested is subject to a  
9 confidentiality agreement with a Non-Party;

10 (2) promptly provide the Non-Party with a copy of the  
11 Stipulated Protective Order in this litigation, the relevant discovery request(s), and  
12 a reasonably specific description of the information requested; and

13 (3) make the information requested available for inspection by the Non-Party.

14 (c) If the Non-Party fails to object or seek a protective order  
15 from this court within 14 days of receiving the notice and accompanying  
16 information, the Receiving Party may produce the Non-Party's confidential  
17 information responsive to the discovery request. If the Non-Party timely seeks a  
18 protective order, the Receiving Party shall not produce any information in its  
19 possession or control that is subject to the confidentiality agreement with the  
20 Non-Party before a determination by the court.<sup>1</sup> Absent a court order to the  
21 contrary, the Non-Party shall bear the burden and expense of seeking protection  
22 in this court of its Protected Material.

23 10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL  
24

25 If a Receiving Party learns that, by inadvertence or otherwise, it has  
26 disclosed Protected Material to any person or in any circumstance not  
27

28 <sup>1</sup>The purpose of this provision is to alert the interested parties to the existence of  
confidentiality rights of a Non-Party and to afford the Non-Party an opportunity to protect its  
confidentiality interests in this court.

1 authorized under this Stipulated Protective Order, the Receiving Party must  
2 immediately (a) notify in writing the Designating Party of the unauthorized  
3 disclosures, (b) use its best efforts to retrieve all unauthorized copies of the  
4 Protected Material, (c) inform the person or persons to whom unauthorized  
5 disclosures were made of all the terms of this Order, and (d) request such person  
6 or persons to execute the "Acknowledgment and Agreement to Be Bound" that  
7 is attached hereto as Exhibit A.

8 11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE  
9 PROTECTED MATERIAL

10 When a Producing Party gives notice to Receiving Parties that certain  
11 inadvertently produced material is subject to a claim of privilege or other  
12 protection, the obligations of the Receiving Parties are those set forth in Federal  
13 Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify  
14 whatever procedure may be established in an e-discovery order that provides  
15 for production without prior privilege review. Pursuant to Federal Rule of  
16 Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect  
17 of disclosure of a communication or information covered by the attorney-client  
18 privilege or work product protection, the parties may incorporate their  
19 agreement in the stipulated protective order submitted to the court.

20 12. MISCELLANEOUS

21 1 Right to Further Relief. Nothing in this Order abridges the right of  
22 any person to seek its modification by the court in the future.  
23

24 2 Right to Assert Other Objections. By stipulating to the entry of this  
25 Protective Order no Party waives any right it otherwise would have to object to  
26 disclosing or producing any information or item on any ground not addressed in  
27 this Stipulated Protective Order. Similarly, no Party waives any right to object  
28

1 on any ground to use in evidence of any of the material covered by this  
2 Protective Order.

3       3     Filing Protected Material. Without written permission from the  
4 Designating Party or a court order secured after appropriate notice to all  
5 interested persons, a Party may not file in the public record in this action any  
6 Protected Material. A Party that seeks to file under seal any Protected Material  
7 must comply with Civil Local Rule 79-5 and General Order 62. Protected  
8 Material may only be filed under seal pursuant to a court order authorizing the  
9 sealing of the specific Protected Material at issue. Pursuant to Civil Local Rule  
10 79-5 and General Order 62, a sealing order will issue only upon a request  
11 establishing that the Protected Material at issue is privileged, protectable as a  
12 trade secret, or otherwise entitled to protection under the law. If a Receiving  
13 Party's request to file Protected Material under seal pursuant to Civil Local  
14 Rule 79-5(d) and General Order 62 is denied by the court, then the Receiving  
15 Party may file the information in the public record pursuant to Civil Local Rule  
16 79-5(e) unless otherwise instructed by the court.


17       13.   FINAL DISPOSITION

18             Within 60 days after the final disposition of this action, as defined in  
19 paragraph 4, each Receiving Party must return all Protected Material to the  
20 Producing Party or destroy such material. As used in this subdivision, "all  
21 Protected Material" includes all copies, abstracts, compilations, summaries, and  
22 any other format reproducing or capturing any of the Protected Material.  
23 Whether the Protected Material is returned or destroyed, the Receiving Party  
24 must submit a written certification to the Producing Party (and, if not the same  
25 person or entity, to the Designating Party) by the 60 day deadline that (1)  
26 identifies (by category, where appropriate) all the Protected Material that was  
27 returned or destroyed and (2) affirms that the Receiving Party has not retained  
28 any copies, abstracts, compilations, summaries or any other format reproducing



1 or capturing any of the Protected Material. Notwithstanding this provision,  
2 Counsel are entitled to retain an archival copy of all pleadings, motion papers,  
3 trial, deposition, and hearing transcripts, legal memoranda, correspondence,  
4 deposition and trial exhibits, expert reports, attorney work product, and  
5 consultant and expert work product, even if such materials contain Protected  
6 Material. Any such archival copies that contain or constitute Protected Material  
7 remain subject to this Protective Order as set forth in Section 4 (DURATION).  
8 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

9  
10 DATED: 11/2/12   
11 Attorneys for Plaintiff

12 DATED: 11/26/12   
13 Attorneys for Defendant

14  
15 PURSUANT TO STIPULATION, IT IS SO ORDERED.

16 DATED: December 5, 2012

17  
18   
19 Honorable Jeffrey S. White  
20 United States District Judge